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**BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA**

**IN THE MATTER OF APPLICATION FOR)
BENEFICIAL WATER USE PERMIT NO. 76D)
30009957 BY THOMAS AND DIANE)
KAEICHELE)** **PROPOSAL FOR DECISION**

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, and after notice required by Mont. Code Ann. §85-2-307 (2003), a hearing was held on April 21, 2005, in Eureka, Montana, to determine whether a beneficial water use permit should be issued to Thomas and Diane Kaechele, hereinafter referred to as "Applicant" for the above application under the criteria set forth in Mont. Code Ann. §85-2-311.

APPEARANCES

Applicant appeared at the hearing in their own behalf through Diane Kaechele. Applicant offered her consultant Marc M. Spratt for cross-examination via telephone but no one requested cross examination. Objector Linda and John Jett appeared at the hearing and testified in their own behalf. Objector Donna and Charles Sims appeared at the hearing in their own behalf. Donna Sims testified for Objector Sims. Mr. Pat Price, Fisheries Biologist, United States Forest Service, and June Maxwell were called to testify by Objectors Jett and Sims.

EXHIBITS

Applicant offered no exhibits for the record. Objectors joined in offering common exhibits for the record. The exhibits are admitted into the record to the extent noted below.

Objectors offered thirty-four exhibits for the record. The Hearing Examiner accepted and admitted into evidence Objectors' Exhibits 4, 9-10, 18-22, 29, 31, 38-40.

Objectors' Exhibit O-Jett/Sims 4 is a one page affidavit of June Maxwell prepared January 24, 2005.

Objectors' Exhibit O-Jett/Sims 9 is a one-page color copy of an unknown map showing the general project area.

Objectors' Exhibit O-Jett/Sims 10 is a one-page copy of an unknown map showing roads, streams, and state and private ownership in the project area.

Objectors' Exhibit O-Jett/Sims 18 is an eighteen-page document entitled "Young Creek Water Yield Analysis" prepared by Pat Price.

Objectors' Exhibit O-Jett/Sims 19 consists of 20 photographs taken by the Objectors on or about December 2004:

19A: View of gage on Young Creek on east side of West Kootenai Road bridge across Young Creek.

19B: View of gage on Young Creek on east side of West Kootenai Road bridge across Young Creek.

19C: View of gage on Young Creek on east side of West Kootenai Road bridge across Young Creek.

19D: View of Young Creek from Jett property.

19E: View of Young Creek along Jett/Sims property showing freezing conditions.

19F: View looking east at Young Creek from West Kootenai Road bridge.

19G: Looking west at Young Creek along Sims' property.

19H: View looking east at Young Creek along Jett/Sims' property east of West Kootenai Road.

19I: View looking east at Young Creek on Jett property east of West Kootenai Road.

19J: View looking east at Young Creek along Sims' property east of West Kootenai Road.

19K: View of Young Creek looking west near the FWP fish trap.

19L: View of Young Creek looking west from the FWP fish trap.

19M: View of Young Creek looking west from the FWP fish trap.

19N: View of Young Creek below FWP fish trap on Young Creek downstream (east) of Sims property.

19O: FWP fish trap on Young Creek east of Sims' property.

19P: Looking East near Young Creek mouth at FWP fish trap.

19Q: Looking East near Young Creek mouth at FWP fish trap.

19R: Looking East near Young Creek mouth.

1 **19S:** Photo of Young Creek above the proposed point of diversion.

2 **19T:** Photo of Young Creek above the proposed point of diversion.

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4 **Objectors' Exhibit O-Jett/Sims 20** consists of seven-pages. The seven pages are
5 copies of five Department of Fish, Wildlife & Parks letters to John and Linda Jett or Young
6 Creek Water Users regarding Young Creek dated July 18, 2001 with two attachments, July 14,
7 2003, August 4, 2003, July 13, 2004, and October 8, 2004.

8 **Objectors' Exhibit O-Jett/Sims 21** consists of three handwritten pages listing water
9 right holders on Young Creek.

10 **Objectors' Exhibit O-Jett/Sims 22** consists of twenty-six pages of lists of Young Creek
11 water right information from various sources.

12 **Objectors' Exhibit O-Jett/Sims 29** is a two-page document entitled "Effects of
13 Diversion to Green Basin and an attached diagram of "Green Basin Views Subdivision".

14 **Objectors' Exhibit O-Jett/Sims 31** is one-page 11"x17" map showing Young Creek and
15 Objectors' land ownership information.

16 **Objectors' Exhibit O-Jett/Sims 38:**

17 **38a:** is entitled "Schedule C" and includes Objector Jett's legal land description and text
18 describing Objector Jett's water diversion and use;

19 **38b:** consists of 2 photographs of Objector Jett's point of diversion from Young Creek;

20 **38c:** consists of a one-page map showing Objector Jett's land parcel information.

21 **Objectors' Exhibit O-Jett/Sims 39** is a one-page ownership map showing Objector
22 Sims' property outline with point of diversion and place of use information sketched on the map.

23 **Objectors' Exhibit O-Jett/Sims 40** is a one-page letter from Objector Charles Sims'
24 doctor discussing Mr. Sims' medical treatment and the water flowing in the creek.

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PRELIMINARY MATTERS

At hearing, Objectors question how illegal ponds can become legal. In other words Objectors believe the Application must be denied because no permit had been received prior to diversion and use of the water as set forth in Mont. Code Ann. §85-2-302 (2003). This issue is discussed in Conclusion of Law No. 3 on page 12.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

FINDINGS OF FACT

General

1. Application for Beneficial Water Use Permit No. 76D 30009957 in the name of and signed by Thomas and Diane Kaechele was filed with the Department on March 4, 2004. (Department file)
2. The Environmental Assessment (EA) prepared by the Department for these applications was reviewed and is included in the record of this proceeding.
3. Applicant seeks to appropriate 20 gallons per minute (gpm) up to 24.10 acre-feet of water per year from Young Creek. The water is to be diverted at a point in the SW¼NW¼SW¼ of Section 14, Township 37 North, Range 28 West, Lincoln County, Montana. The proposed means of diversion is a headgate. The proposed use is fish and wildlife in three offstream ponds. The proposed place of use is in the SE¼NE¼NW¼ of Section 14, Township 37 North, Range 28 West, Lincoln County, Montana. The proposed period of diversion and period of use

1 is October 1 through June 30, inclusive, of each year. The total volume of the ponds is 0.7 acre-
2 feet. (Department file)

3 4. The Applicant agreed to three conditions proposed by the Department's Kalispell Water
4 Resources Regional Office to be placed on any permit that might be issued. The conditions in
5 brief require the Appropriator to: 1) measure and report the flow and volume of water diverted;
6 2) cease diversion when Young Creek flows drop below specified rates (DFWP's instream flow
7 right); and 3) install a screen on the diversion works to prevent entry of fish and fry into the
8 diversion system. (Department file, testimony of Diane Kaechele)

9 5. The headgate and ponds were constructed by a prior owner and have been used by the
10 Applicant prior to August 2004. In August 2004, Applicant stopped diverting water to their
11 ponds. All of the fish in the ponds have since died. (Testimony of Diane Kaechele)

12 **Physical Availability**

13 6. The United States Forest Service (Eureka Ranger Station) has been collecting Young
14 Creek flow data at a site near the mouth of Young Creek and approximately 6000 feet
15 downstream of the proposed diversion. Data are available for 1997 through 2004. The lowest
16 mean monthly flow recorded for 1997-2002 is 0.62 cubic feet per second (cfs). This converts¹ to
17 approximately 278.3 gallons per minute (gpm). Applicant has requested 20 gpm, or .045 cfs².
18 Water is physically available during the period requested in excess of the amount requested.
19 (Department file, Exhibit O-Jett/Sims 18)

20 **Legal Availability**

21 7. Applicant has provided a comparison of the physical water supply near the proposed
22 point of diversion with the existing legal demands on the supply of water. Applicant subtracted

¹ 0.62 cfs times 448.8 gpm per cfs=278.256 gpm

² 20 gpm divided by 448.8 gpm per cfs=.045 cfs

1 the existing legal demands (both private appropriators and Montana Department of Fish, Wildlife
2 & Parks) from the monthly mean flow in Young Creek for each month of the year to determine
3 legal availability of water in Young Creek. The months of July, August, and September have
4 negative values. However, for the months Applicant requested water, October through June,
5 Applicant's comparison shows the lowest amount of water legally available is June with 1.68 cfs.
6 This flow rate is in excess of the .045 cfs requested by the Applicant. Applicant, or their
7 predecessor, has been diverting 20-25 gpm into the ponds prior to August 2004, so the effects
8 of the proposed diversion are included in the flow data used by the Applicant to show water
9 availability. (Department file, testimony of Diane Kaechele)

10 8. Objectors' water rights (legal demands) are for irrigation from Young Creek with a period
11 of diversion of April 1 through September 30, inclusive, of each year. Objectors' legal demands
12 were included in Applicant's legal availability analysis. Water for Objectors' use is available in
13 the overlapping month's of use with this Application. (Department file, testimony of Linda Jett,
14 Donna Sims)

15 9. Objectors are concerned that the use of mean monthly flow data to show water is legally
16 available does not show times during the month when daily flows may drop below the Montana
17 Department of Fish, Wildlife & Parks' (DFWP) water right for instream flow. DFWP's instream
18 right is for 25 cfs during May and June and 5 cfs the remainder of the year. Young Creek flows
19 below these rates mean DFWP's water right is not met. Mr. Price, objectors' witness, explained
20 that daily measurements are not made, but are interpolated from the actual stream
21 measurement data. Winter measurements can not be made because ice affects the readings.
22 Mr. Price understands that dewatering in Young Creek occurs during the summer months.
23 When Applicant's existing legal demand information is compared with Objectors' mean daily
24 flow data for 1997-2004, it shows there are days when the legal demand is not met. However,

1 the mean daily data is interpolated, not measured. The data used by Objectors is for 1997-2004
2 which contains a seven year drought period. When the daily data for 1997, the period before the
3 drought, is used, there are only fifteen (15) days between March 1 and June 30 (Exhibit O-
4 Jett/Sims 18) when legal demands exceed available water. Whether these fifteen days are the
5 result of interpolation of data or actual stream conditions is not known. If the 15 days are the
6 result of actual stream conditions, DFWP did not object to this application and indicate that
7 water is not legally available or their water right would be adversely affected by this proposed
8 use. Objectors provided evidence of DFWP's call for water on Young Creek for the summer
9 months, but no evidence of call during the winter months was provided. Thus, my review of the
10 mean daily and mean monthly data, coupled with the lack of evidence by appropriator DFWP
11 regarding their year round instream flow water right, I find water can reasonably be considered
12 legally available for the requested period of use. (Department file, testimony of Diane Kaechele,
13 Pat Price, June Maxwell, Donna Sims, Exhibit O-Jett/Sims 18)

14 **Adverse Effect**

15 10. Applicant plans to divert water from Young Creek using an existing headgate, ditch,
16 secondary headgate, pipeline, and valve from the pipeline to get water to the ponds.
17 (Attachment No.1 on page 19 is a copy of the Application "Kaechele Site Map") The headgate at
18 the beginning of the pipeline can be closed so no water flows to the Applicant or other users.
19 Valves where Applicant takes water from the pipeline can be closed to shut off all water except
20 that flowing to the Applicant. The valve between the supply pipeline and the ponds is completely
21 under the control of the Applicant and can be regulated or shut off when flow conditions on
22 Young Creek require reduced use or complete shut down. In addition, Applicant plans to use a
23 flow meter to assure the amount flowing to the ponds is regulated to the amount appropriated.
24 (Department file, testimony of Diane Kaechele)

11. Applicant does not own the land where the headgate on Young Creek is located or where the pipeline and secondary headgate are located approximately 500 feet from Young Creek. Applicant does own other water rights that take water from this diversion works. The right of access to the diversion works by the Applicant is contested, but ownership of the valve (between the main pipeline and the pipeline to the ponds) is under the control of the Applicant. Thus, Applicant can shut off and otherwise regulate the flow of water into their ponds with the valve located at their tap into the main pipeline in the event flow regulation is needed to satisfy the right of a prior appropriator. (Department file, testimony of Diane Kaechele)

12. Objectors have water rights for irrigation from Young Creek during the months of April through September. Applicant can regulate use with their valve in the event there is not sufficient water for their use in Young Creek. Objector Sims produced evidence from Mr. Sims' medical doctor that an essential part of Mr. Sims' treatment is the creek flowing by his home to create a soothing and restful home environment. There is no evidence of a water right for this purpose, so this use is not one which Applicant must demonstrate will be satisfied during the proposed use. Therefore, Applicant has a plan to demonstrate that the Applicant's use of water can be controlled so the rights of prior appropriators will be satisfied. (Department file, testimony of Diane Kaechele)

Adequacy of Appropriation Works

13. The appropriation works consists of an existing headgate on Young Creek, a ditch, and a secondary headgate on the ditch through which water enters a pipeline. This 10 inch diameter pipeline is approximately 2640 feet long, which is then stepped down to an 8 inch diameter pipeline approximately 2640 feet long, and finally stepped down to 6 inch diameter pipeline which is approximately 1340 feet long. The secondary headgate at the beginning of the pipeline is set behind a mesh debris screen. At a point adjacent to the uppermost pond, the pond supply

1 line taps the main pipeline, goes through a valve, and then through a meter. After the water is
2 metered, it is split into two 1 inch lines. One is a bubbler line around the shoreline of the upper
3 pond, and the other spills directly into the upper pond. Buried 6 inch PVC pipelines carry pond
4 overflow from the upper pond to the middle pond, and then from the middle pond to the lower
5 pond. (Attachment No.1 on page 19 is a copy of the Application "Kaechele Site Map") There
6 have been problems caused by water freezing in the pipeline which goes to "Green Basin", but
7 not in the pipeline used for the ponds. This appropriation works is existing and has been in use
8 to carry 20-25 gpm to Applicant's ponds. The appropriation works are adequate to divert and
9 carry the requested flow to the Applicant. (Department file, testimony of Diane Kaechele, Linda
10 Jett)

11 **Beneficial Use**

12 14. Applicant intends to stock the ponds with a total of 22 fish, provide water for an aquatic
13 habitat, and provide water for area wildlife. Applicant's consultant provided a Criteria Addendum
14 A report as part of the Application. Water requested in the Application was determined by fish
15 oxygen demand and pond seepage rate. The estimated flow to provide oxygen for twenty-two
16 (22), three (3) pound fish is ten (10) gpm. The measured wintertime seepage rate from the
17 ponds is 20 gpm. Twenty gpm is the wintertime inflow required to maintain a constant water
18 level in all three ponds with no outflow. Applicant's consultant states in the Application "[G]iven
19 that the estimated fishery flow requirement is 10 gpm an inflow rate that satisfies the seepage
20 loss (20 gpm) will also fulfill the flow requirement for the fishery." No evidence was provided
21 explaining that the water lost to seepage (20 gpm) is a beneficial use of water and not waste.
22 The water lost to seepage is not a beneficial use of water. (Department file)

23 15. Applicant has shown that 10 gpm is the amount of water necessary to sustain the
24 proposed number of fish with oxygen. Without water during the months of July, August, and

1 September, the fish will likely die. Applicant intends to change the purpose of use of one of their
2 irrigation water rights to a fishery purpose for these months if a permit issues from this
3 Application to preserve the fishery. Thus, Applicant is proposing a year round use. When
4 Applicant has year round water for the fishery use proposed here, Applicant has proven that 10
5 gpm for a fishery purpose is a beneficial use of water. Ten (10) gpm for the requested period of
6 use converts³ to a volume of 12.05 acre-feet. (Department file, testimony of Diane Kaechele)

7 16. Applicant cites Mont. Code Ann. §85-2-102(2)(a) as proof that “fish and wildlife”
8 purposes are beneficial. However, Applicant provided no evidence of wildlife or other aquatic
9 use which is under the control of the Applicant that would quantify or justify a flow rate or
10 volume of water necessary for a wildlife purposes. Applicant has not justified a flow rate or
11 volume that shows the proposed use of water for a wildlife pond is beneficial. (Department file,
12 testimony of Diane Kaechele)

13 **Possessory Interest**

14 17. Applicant is the owner of the property which has been designated in the Application as
15 the place of use. (Department file)

16 **Water Quality Issues**

17 18. An objection relative to water quality of prior appropriators was filed against this
18 application and determined to be valid. No objections relative to water classification or to the
19 ability of a discharge permit holder to satisfy effluent limitations of his permit were filed.
20 (Department file.)

21 19. Objector Sims objects that the proposed appropriation will decrease the current TMDL
22 capacity of Young Creek and they are concerned as taxpayers about any impacts to the Young

³ 10 gpm times 1440 min/day times 273 days / 325851 gal/acre-foot ≈ 12.05 acre-feet

1 Creek fishery resource. Applicant and Mr. Price, Objectors' fisheries witness, agree there is no
2 TMDL set for Young Creek, and Young Creek is not on the list of streams to be studied for
3 TMDL's. Mr. Price testified that the temperature aspect of water quality will affect the fish. Mr.
4 Price testified that 20 gpm will have a negligible affect on the west slope cutthroat trout
5 population because of the number of fish downstream of the point of diversion and the
6 requested rate is only 0.04 cfs. Mr. Price testified that the contribution the 20 gpm use would
7 have on water quality or quantity of Young Creek is impossible to test. Applicant completed a
8 model for Young Creek in order to simulate water quality parameters both with and without a
9 diversion of 20 gpm. The model compared results between the flows before and after the 20
10 gpm was assumed diverted. The model for the additional diversion of 20 gpm yielded no change
11 in temperature, total phosphorus, and total nitrogen, in the stream compared to the model
12 without the diversion. The appropriator with a water right for the Young Creek fishery resource,
13 DFWP, did not offer evidence about any water quality affects. The Applicant can stop the
14 diversion in the event a prior appropriator calls the source because the water quality is no longer
15 acceptable for their use. Without evidence to the contrary, Applicant has shown that the water
16 quality of a prior appropriator will not be adversely affected. (Department file, testimony of Pat
17 Price)

18 Based on the foregoing Findings of Fact and the record in this matter, the Hearing
19 Examiner makes the following:

21 **CONCLUSIONS OF LAW**

22 1. The Department has jurisdiction to issue a provisional permit for the beneficial use of
23 water if the applicant proves the criteria in Mont. Code Ann. §85-2-311 by a preponderance of
24 the evidence. Mont. Code Ann. §85-2-311(1).

1 2. A permit shall be issued if there is water physically available at the proposed point of
2 diversion in the amount that the applicant seeks to appropriate; water can reasonably be
3 considered legally available during the period in which the applicant seeks to appropriate, and in
4 the amount requested, based on an **analysis** of the evidence on physical water availability and
5 the existing legal demands, including but not limited to a comparison of the physical water
6 supply at the proposed point of diversion with the existing legal demands on the supply of water;
7 the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a
8 state reservation will not be adversely affected based on a consideration of an applicant's **plan**
9 for the exercise of the permit that demonstrates that the applicant's use of the water will be
10 controlled so the water right of a prior appropriator will be satisfied; the proposed means of
11 diversion, construction, and operation of the appropriation works are adequate; the proposed
12 use of water is a beneficial use; the applicant has a possessory interest, or the written consent
13 of the person with the possessory interest, in the property where the water is to be put to
14 beneficial use; and, if raised in a valid Objection, the water quality of a prior appropriator will not
15 be adversely affected, the proposed use will be substantially in accordance with the
16 classification of water, and the ability of a discharge permit holder to satisfy effluent limitations of
17 a permit will not be adversely affected. Mont. Code Ann. §85-2-311 (1) (a) through (h).

18 3. At hearing, Objectors Jett and Sims in direct testimony regarding use of the ponds prior
19 to issuance of a beneficial water use permit, implied such use should result in a permit denial.
20 Although using water without a beneficial water use permit is a misdemeanor and criminal
21 sanctions may apply, the penalties authorized do not include denial of a beneficial water use
22 permit. Mont. Code Ann. §§ 85-2-122 and 46-18-212 (2003). The Department has no statutory
23 authority to deny an application on such grounds. *See e. g. In The Matter Of Application 41C-*
24 *G(W)210737 by Klemo*, Final Order (1996).

1 4. The Applicant has proven that water is physically available at the proposed point of
2 diversion in the amount Applicant seeks to appropriate. Mont. Code Ann. §85-2-311(1)(a)(i).
3 See Finding of Fact No. 6.

4 5. The Applicant has proven that water can reasonably be considered legally available.
5 Objectors presented evidence that use of mean monthly flows may not show times when water
6 in Young Creek is less than DFWP's instream flow water right. Thus, it may appear water is
7 legally available when it is not. However, the data used by both Applicant and Objectors
8 contains only one year which is not in a drought period. Young Creek has experienced low flows
9 in recent years, but decreased flows are likely the result of the current drought. Legal availability
10 is determined by analysis of non-drought periods. See *In The Matter of Application 41B-074154*
11 *by Johnson*, Proposal For Decision, (1990). Applicant has shown in non-drought years sufficient
12 unappropriated water will be physically available at the point of diversion to supply the amount
13 requested throughout the period of appropriation, and that at least in some years, no legitimate
14 calls for water will be made on him by a senior appropriator. Mont. Code Ann. §85-2-
15 311(1)(a)(ii). See Finding of Fact Nos. 7, 8, 9.

16 6. The Applicant has proven that the water rights of prior appropriators under existing water
17 rights, certificates, permits, or state reservations will not be adversely affected when conditioned
18 according to their plan to measure and control flows. Applicant also agreed to conditions
19 proposed by the Department's Kalispell Water Resources Regional Office which require
20 Applicant to cease diverting when DFWP's instream water rights are not met and to use a fish
21 screen on the diversion works to prevent entry of fish and fry into the diversion works.
22 Measurement of the flow and volume will prevent Applicant from diverting more water than what
23 has been requested. Applicant plans to use a valve on the pipe that takes water from the main
24 pipeline to the first pond to restrict flows to the permitted flow rate. Even though access to the

1 secondary headgate off Young Creek is contested, it behooves the Applicants to be aware of
2 their responsibility in the physical condition of the shared headgates and pipeline at all times
3 they are diverting water. Mont. Code Ann. §85-2-311(1)(b). See Finding of Fact Nos. 4, 10, 11,
4 12.

5 7. The Applicant has proven that the proposed means of diversion, construction, and
6 operation of the appropriation works are adequate. Mont. Code Ann. §85-2-311(1)(c). See
7 Finding of Fact No. 13.

8 8. The Applicant has not proven the proposed use of water is a beneficial use of water for
9 which Applicant can establish a water right under a permit without conditions. Applicant intends
10 to apply to change the purpose of use of one of their irrigation water rights to a fishery purpose
11 for July, August, and September if a permit issues from this Application to make sure the pond
12 fishery has water year-round. The Applicant has proven that the requested 10 gpm is the
13 amount of water necessary to sustain the proposed fishery purpose. See *Bitterroot River*
14 *Protective Association v. Siebel, Cause No. BDV-2002-519, Order on Petition for Judicial*
15 *Review*, August 4, 2003 (First Judicial District, Lewis and Clark County). However, all water
16 requested for the ponds, 20 gpm, will seep out the bottom of the ponds. The seepage loss in
17 excess of what the fish need, 10 gpm, has not been shown to be a beneficial use of water. The
18 10 gpm diverted, but not needed by the fish, is a waste of the water when alternatives exist,
19 such as lining the ponds, that would prevent such loss and still accomplish the intended
20 purpose. See *In the Matter of 76LJ-11583000 By Ramona and William Nessly, Proposal For*
21 *Decision* (2003). Waste is defined in part as the unreasonable loss of water through the design
22 or negligent operation of an appropriation facility. Mont. Code Ann. § 85-2-102 (18). Here, there
23 is evidence of chronic low summer flows and some winter flows which approach legal demands.
24 Applicant must provide a preponderance of evidence that the proposed use of water will benefit

1 appropriator, other persons, or public, **and** that water can be used without waste. The
2 Department may not issue a permit for more than can be beneficially used without waste. See
3 Mont. Code Ann. § 85-2-312(1); *In the Matter of 81855-s41H by Martin and Ewing*, Proposal For
4 Decision (1993); *Bitterroot River Protective Association v. Siebel*, *supra*. If Applicant lines the
5 ponds to prevent seepage, the extra water diverted to provide sufficient flow to equal the
6 seepage loss will not be necessary or wasted. Conditions requiring Applicant to change 10 gpm
7 of an existing water right to a fishery purpose during the months of July, August, and September
8 and to line the pond will allow Applicant's fish to survive with 10 gpm and be a beneficial use.
9 The volume required at 10 gpm is decreased from 24.10 acre-feet to 12.05 acre-feet per year,
10 because the Department cannot grant a permit for water which will be wasted (seepage). Mont.
11 Code Ann. §§85-2-311(1)(d), 312(1). See Finding of Fact Nos. 7, 9, 14, 15, 16.

12 9. The Applicant has proven they have a possessory interest in the property where water is
13 to be put to beneficial use. There was discussion at hearing regarding the ownership of the point
14 of diversion. The criteria requires a possessory interest in the place of use, not the point of
15 diversion. Mont. Code Ann. §85-2-311(1)(e). See, Finding of Fact No. 17.

16 10. The Applicant has proven the water quality of a prior appropriator will not be adversely
17 affected. Objection was raised as to the issue of water quality of a prior appropriator being
18 adversely affected. The objection that removing 20 gpm from Young Creek will weaken the
19 TMDL capacity of Young Creek is not supported with evidence of sufficient weight to determine
20 the water rights of DFWP, or any other Young Creek appropriator, will be adversely affected if
21 an additional 20 gpm is removed from Young Creek. Mont. Code Ann. §85-2-311(1)(f), (g), (h).
22 See, Finding of Fact Nos. 18, 19.

23 11. The Department may issue a permit subject to terms, conditions, restrictions, and
24 limitations it considers necessary to satisfy the criteria for issuance of a beneficial water use

1 permit. Applicant has met the criteria for issuance of a permit when conditions are applied.

2 Mont. Code Ann. §85-2-312. See Conclusions of Law Nos. 6, and 8 above.

3 **WHEREFORE**, based upon the foregoing Findings of Fact and Conclusions of Law, the
4 Hearing Examiner makes the following:

5
6 **PROPOSED ORDER**

7 Subject to the terms, conditions, restrictions, and limitations listed below, Beneficial
8 Water Use Permit 76LJ-11694000 is **GRANTED** to Thomas and Diane Kaechele to appropriate
9 10 gallons per minute (gpm) up to 12.05 acre-feet of water per year from Young Creek. The
10 water is diverted at a point in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 14, Township 37 North, Range 28
11 West, Lincoln County, Montana. The means of diversion is an existing headgate. The purpose is
12 a fishery in three offstream ponds . The place of use is in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 14,
13 Township 37 North, Range 28 West, Lincoln County, Montana. The period of diversion and
14 period of use is October 1 through June 30, inclusive, of each year. The volume of the ponds is
15 0.7 acre-feet.

16 A. Permittee shall line the pond with a plastic or other sufficient liner that prevents seepage
17 from the pond. The liner must be maintained so water does not seep from the pond.

18 B. Applicant shall apply for and receive authorization to change the purpose and place of
19 use of 10 gpm of water from another water right to the fishponds for the period August 1 through
20 September 30 of each year **prior to diverting water under this permit**. Nothing in this Order
21 shall be construed as having granted or approved the required change.

22 C. The appropriator shall install a Department-approved in-line flow meter at a point in the
23 delivery line approved by the Department. Water must not be diverted until the required
24 measuring device is in place and operating. On a form provided by the Department, the

1 appropriator shall keep a written weekly record of the flow rate and volume of all water diverted,
2 including the period of time. Records shall be submitted by November 30th of each year and
3 upon request at other times during the year. Failure to submit records may be cause for
4 revocation or modification of a permit or change. The records must be submitted to the
5 Department's Kalispell Water Resources Regional Office. The appropriator shall maintain the
6 measuring device so it always operates properly and measures flow rate and volume
7 accurately.

8 D. The appropriator shall cease diverting water whenever the flow of Young Creek is 25 cfs
9 or less between May 1 and June 30 of any year, or is 5 cfs or less at any other time during the
10 authorized period of appropriation.

11 E. The appropriator shall use a screen on his diversion works, which is of sufficiently small
12 mesh size to prevent the entry of fish and fry into the diversion system.

14 **NOTICE**

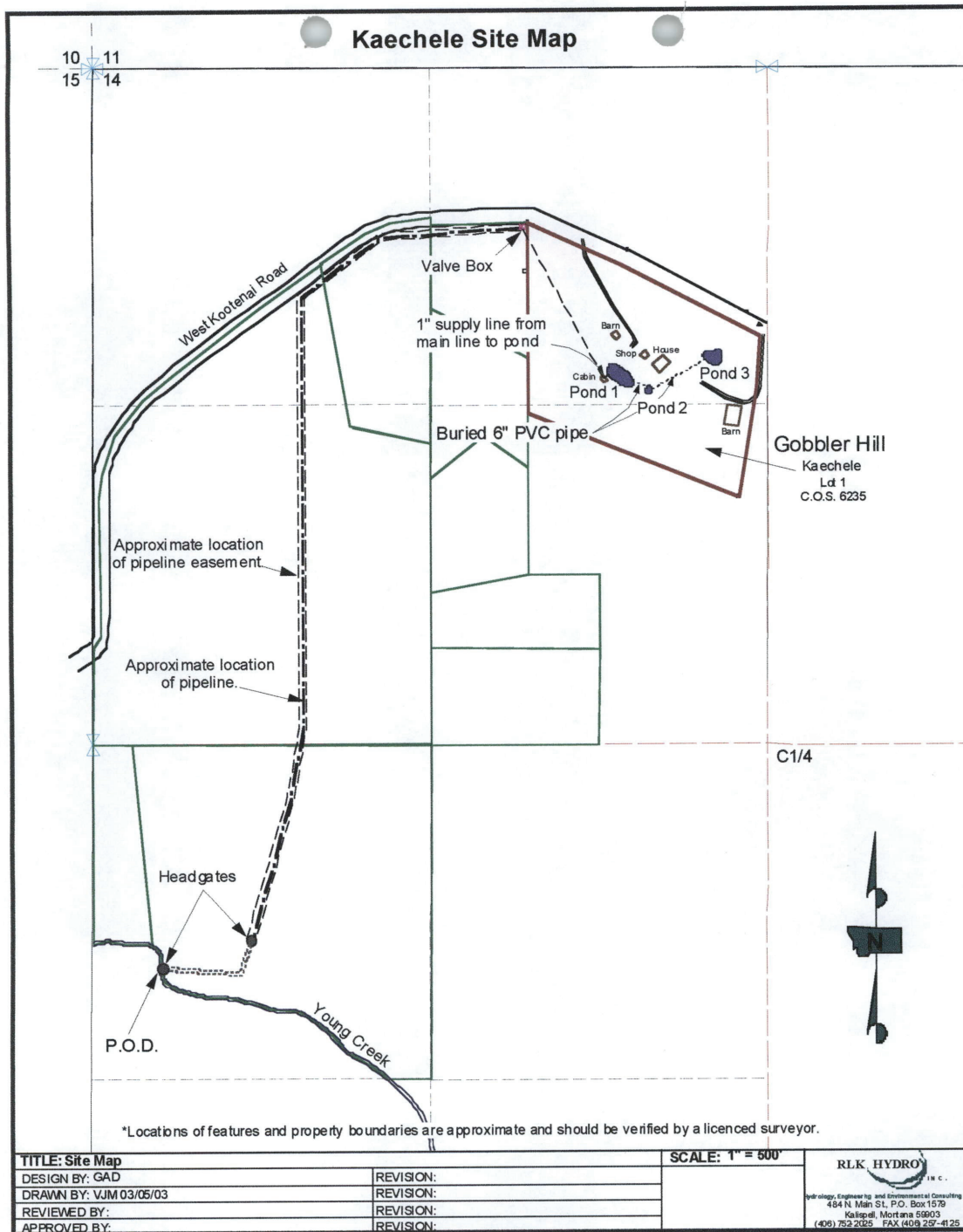
15 This Proposal for Decision may be adopted as the Department's final decision unless
16 timely exceptions are filed as described below. Any party adversely affected by this Proposal for
17 Decision may file exceptions and a supporting brief with the Hearing Examiner and request oral
18 argument. Exceptions and briefs, and requests for oral argument must be filed with the
19 Department by May 31, 2005, or postmarked by the same date, and copies mailed by that same
20 date to all parties. No new evidence will be considered.

21 No final decision shall be made until after the expiration of the above time periods, and
22 due consideration of *timely* oral argument requests, exceptions, and briefs.

23 Dated this 9th day of May, 2005.

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Charles F Brasen
Hearings Officer
Water Resources Division
Department of Natural Resources
and Conservation
PO Box 201601
Helena, Montana 59620-1601



CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the Proposal For Decision was served upon all parties listed below on this 9th day of May 2005 by first class United States mail.

Thomas & Diane Kaechele
4155 W Kootenai Road
Rexford MT 59930

RLK Hydro Inc (applicant's consultant)
PO Box 1579
Kalispell MT 59903-1579

John & Linda Jett
3700 W Kootenai Road
Rexford MT 59930

Water Resources Division
Kalispell Regional Office
109 Cooperative Way Suite 110
Kalispell MT 59901-2387

Charles & Donna Sims
PO Box 876
Eureka MT 59917

HEATHER MCLAUGHLIN
HEARINGS UNIT
406-444-6615

**BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA**

**IN THE MATTER OF APPLICATION FOR)
BENEFICIAL WATER USE PERMIT NO. 76D)
30009957 BY THOMAS AND DIANE)
KAEICHELE)**

FINAL ORDER

The proposal for decision in this matter was entered on May 9, 2005. None of the parties filed timely written exceptions or requested an oral argument hearing pursuant to Mont. Admin. R. 36.12.229.

Therefore, the Department of Natural Resources and Conservation (Department) hereby adopts and incorporates by reference the Findings of Fact and Conclusions of Law in the Proposal for Decision.

Based on the record in this matter, the Department makes the following order:

ORDER

Subject to the terms, conditions, restrictions, and limitations listed below, Beneficial Water Use Permit 76LJ-11694000 is **GRANTED** to Thomas and Diane Kaechele to appropriate 10 gallons per minute (gpm) up to 12.05 acre-feet of water per year from Young Creek. The water is diverted at a point in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 14, Township 37 North, Range 28 West, Lincoln County, Montana. The means of diversion is an existing headgate. The purpose is a fishery in three offstream ponds . The place of use is in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 14, Township 37 North, Range 28 West, Lincoln County, Montana. The period of diversion and period of use is October 1 through June 30, inclusive, of each year. The volume of the ponds is 0.7 acre-feet.

A. Permittee shall line the pond with a plastic or other sufficient liner that prevents seepage from the pond. The liner must be maintained so water does not seep from the pond.

- B. Applicant shall apply for and receive authorization to change the purpose and place of use of 10 gpm of water from another water right to the fishponds for the period August 1 through September 30 of each year **prior to diverting water under this permit**. Nothing in this Order shall be construed as having granted or approved the required change.
- C. The appropriator shall install a Department-approved in-line flow meter at a point in the delivery line approved by the Department. Water must not be diverted until the required measuring device is in place and operating. On a form provided by the Department, the appropriator shall keep a written weekly record of the flow rate and volume of all water diverted, including the period of time. Records shall be submitted by November 30th of each year and upon request at other times during the year. Failure to submit records may be cause for revocation or modification of a permit or change. The records must be submitted to the Department's Kalispell Water Resources Regional Office. The appropriator shall maintain the measuring device so it always operates properly and measures flow rate and volume accurately.
- D. The appropriator shall cease diverting water whenever the flow of Young Creek is 25 cubic feet per second (cfs) or less between May 1 and June 30 of any year, or is 5 cfs or less at any other time during the authorized period of appropriation.
- E. The appropriator shall use a screen on his diversion works, which is of sufficiently small mesh size to prevent the entry of fish and fry into the diversion system.

NOTICE

A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under the Montana Administrative Procedure Act (Title 2, Chapter 4, Mont. Code Ann.). A petition for

judicial review under this chapter must be filed in the appropriate district court within 30 days after service of the final order. (Mont. Code Ann. § 2-4-702)

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcript prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements for preparation of the written transcript. If no request for a written transcript is made, the Department will transmit only a copy of the audio recording of the oral proceedings to the district court.

Dated this 15th day of June 2005.

/Original Signed by Jack Stults/
Jack Stults, Administrator
Water Resources Division
Department of Natural Resources and
Conservation
PO Box 201601
Helena, MT 59620-1601

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the FINAL ORDER was served upon all parties listed below on this 17th day of June 2005 by first class United States mail.

THOMAS & DIANE KAEICHELE
4155 W KOOTENAI ROAD
REXFORD MT 59930

JOHN & LINDA JETT
3700 W KOOTENAI ROAD
REXFORD MT 59930

CHARLES & DONNA SIMS
PO BOX 876
EUREKA MT 59917

Cc:

RLK HYDRO INC (APPLICANT'S
CONSULTANT)
PO BOX 1579
KALISPELL MT 59903-1579

WATER RESOURCES DIVISION
KALISPELL REGIONAL OFFICE
109 COOPERATIVE WAY SUITE 110
KALISPELL MT 59901-2387

PHOEBE WILLIAMS
HEARINGS UNIT
406-444-6615